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Supreme Court of the United States

October Term, 1941.

No. 772.

DEWEY BRILLHART, Administrator of the Estate of James Dwight Brillhart, Deceased, *Petitioner*,

vs.

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Supreme Court of the United States

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No. ——.

DEWEY BRILLHART, Administrator of the Estate of James Dwight Brillhart, Deceased, *Petitioner*,

vs.

THE EXCESS INSURANCE COMPANY OF AMERICA, a Corporation, *Respondent*.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Opinion Below.

The final order of the District Court (R. 42) is unreported. The opinion of the Circuit Court of Appeals (R. 44-48) is reported in 121 F. (2d) 776.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 23, 1941 (R. 48). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

Due to the omissions in petitioner's statement, respondent deems it necessary to make this additional statement of the facts.

Respondent filed its bill of complaint for a declaratory judgment in the District Court on April 10, 1940 (R. 4). Original federal jurisdiction affirmatively appeared, the complaint alleging diversity of citizenship and that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3000 (R. 6). After the suit was filed, it was revealed that the defendant, Walter C. Young, had died and the cause proceeded against the remaining defendant, Dewey Brillhart, who is the petitioner here.

Respondent is a New York insurance company engaged in the business of reinsuring direct writing insurers. In the year 1932 respondent entered into a contract with Central Mutual Insurance Company of Chicago, Illinois (a direct writing insurance company), by the terms of which respondent agreed to repay any amount of ultimate net loss which Central might pay, over and above certain specified amounts, by reason of losses under public liability policies issued by Central during the life of the reinsuring agreement (R. 6, 7)[1]. This contract was signed by Central in Chicago, Illinois, and by respondent in New York City (R. 8).

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[1]The reinsuring clause of the contract provides: "Section I. The Reinsurer agrees to reinsure the Company (Central) as respects all third party automobile public liability policies, * * * and agrees to repay any amounts of ultimate net loss which the Company may pay in excess of the first Five Thousand Dollars ($5000) on account of any one person injured or killed and the first Ten Thousand Dollars ($10,000) on account of more than one person injured or killed in any one accident. * * *."

Section II. "The term 'ultimate net loss' shall be understood to mean and shall mean the sum actually paid in cash in settlement of losses for which the Company is liable, * * *." (R. 6, 7.)

In January of 1934 Central issued a policy of public liability insurance to Cooper-Jarrett, Inc., a motor freight carrier operating out of Kansas City, Missouri (R. 7, 8). By this policy Central agreed to insure Cooper-Jarrett against loss from liability imposed by law for damages on account of bodily injury, including death, occasioned by the ownership, operation or maintenance of certain motor vehicles described in the policy (R. 8).

In October, 1934, petitioner's decedent was killed in an accident that occurred in the state of Ohio while he was operating a truck leased by Cooper-Jarrett (R. 9). Immediately after the accident petitioner filed a damage suit against Cooper-Jarrett in the Circuit Court of Jackson County, Missouri, at Independence (R. 9). Central was tendered the defense of the suit, but refused to do so upon the ground that its policy did not cover the accident and the injury sustained. Cooper-Jarrett then employed counsel who filed an answer traversing the allegations of the petition (R. 9).

On January 11, 1937, Central was found to be hopelessly insolvent and the Circuit Court of Cook County, Illinois, in a statutory liquidation proceeding, entered an order directing the liquidation of the company and appointing Henry G. Miller, Esq., permanent receiver of all Central's assets. Within a few days the Illinois court made an order restraining and enjoining all persons from bringing, prosecuting or maintaining any action against Central except in that court. By another order it directed all claimants to present their claims to that court. Notices of the above order and proceedings were sent by the receiver to all known claimants and policyholders. Petitioner never filed any claim with the receiver, and there is no longer any liability on the part of Central or its receiver (R. 10).

Subsequent to Central's receivership and on May 14, 1937, Cooper-Jarrett, Inc., filed in the Federal District Court for the Western District of Missouri its petition for reorganization under the provisions of Section 77B in the Federal Bankruptcy Act (R. 10). Petitioner filed his claim in that proceeding, but on April 1, 1939, the Bankruptcy Court, upon *ex parte* application, permitted petitioner to withdraw his claim and prosecute his action in the Missouri state court on the ground that Cooper-Jarrett had insurance (R. 10, 11). April 1, 1939, the final decree in the 77B proceeding was entered and it, *inter alia*, fully and finally discharged Cooper-Jarrett from any claim or judgment that had been obtained or might be obtained by petitioner (R. 10, 11).

On April 22, 1939, a default judgment for $20,000 was entered by the Circuit Court of Jackson County, Missouri, against Cooper-Jarrett and in favor of petitioner. Almost two years before (September 30, 1937) the attorneys employed by Cooper-Jarrett had withdrawn and thereafter and at at the time the default judgment was rendered Cooper-Jarrett was without counsel and no defense was offered (R. 10).

Following the default judgment, petitioner attempted to serve (contrary to the existing orders of the Circuit Court of Cook County, Illinois) summons in garnishment upon Central by delivering copies thereof to the superintendent of insurance for the state of Missouri (R. 11). Final judgment for $22,100, by default, was entered against Central in this garnishment proceeding on June 28, 1940 (R. 38).

Respondent filed its bill of complaint for declaratory relief in the United States District Court for the District of Kansas on April 10, 1940 (R. 4). At that time respondent was not and never had been a party to any

of the proceedings against Cooper-Jarrett, Inc., or Central in the Missouri state court. Moreover, respondent had never been notified by Central either of the Ohio accident or of the claim and suit filed by petitioner against Cooper-Jarrett. This Central was obligated to do by the terms of the contract of reinsurance between it and respondent.[1] Central had also failed to notify respondent of the issuance of its policy to Cooper-Jarret, Inc., and had never filed a specimen copy thereof with respondent as it was required to do by Section V of the contract.[2] The first knowledge respondent ever had of petitioner's suit against Cooper-Jarrett was on February 9, 1939, when it received a letter from Frank T. Barker, Esq., the attorney for Cooper-Jarrett in the reorganization proceeding. In that letter Mr. Barker stated that he had learned respondent had reinsured Central, and requested confirmation of such information. He also listed the cases that were pending against Cooper-Jarrett, Inc., when the reorganization proceeding was instituted, and stated some had gone to judgment. Petitioner's case was included in that list. On February 20, 1939, respondent replied, stating that it had no record of such cases and referred Mr. Barker to the receiver for Central (R. 13).

After respondent filed this action for declaratory relief, and on May 25, 1940, the petitioner had summons in garnishment against respondent served on the superin-

[1] Sec. IX: "The Company shall notify the Reinsurer immediately after it has had notice of any accident in which this reinsurance is or may probably be involved. * * *"

Sec. X: "The Company shall furnish the Reinsurer as soon after the first of the year as possible a list of outstanding claims in which the Reinsurer is interested, showing the amounts of loss reserves for each outstanding claim and the amount claimed thereon on the estimated value of the claim." (R. 7.)

[2] Sec. V provides: "The Company shall file with the Reinsurer a specimen copy of each policy form issued by the Company and reinsured hereunder and the Company shall furnish amendments thereto as and when changes are made." (R. 7.)

tendent of insurance for the state of Missouri (R. 33, 38). This was the first time that any action was taken against respondent, although it had previously been threatened with suit (R. 12, 14).

Neither Cooper-Jarrett nor Central have ever paid out anything upon the claim of petitioner and both Cooper-Jarrett and Central have been discharged from all liability by the orders of the Federal District Court for the Western District of Missouri and the Circuit Court of Cook County, Illinois. Neither Cooper-Jarrett nor Central have ever defended the suit brought by petitioner and the judgments upon which petitioner is proceeding against respondent in the Missouri state court have been default judgments rendered without any trial on the merits.

SUMMARY OF ARGUMENT.

I.

The bill of complaint showed the existence of an actual, justiciable controversy between the parties. Respondent was not a party, and never had been a party, to any pending state court action of petitioner's when its declaratory judgment suit was filed. Therefore, the Appellate Court's reversal of the District Court's final order of dismissal was proper.

II.

There was no pending state court action to which respondent was a party when the bill for declaratory relief was filed, and thereore, if the bill stated an actual, justiciable controversy it was an abuse of the trial court's discretion to dismiss it. Furthermore, since respondent was not a party to any pending state court action, the declaratory judgment suit was not tantamount to the removal of a non-removable cause.

III.

There is no conflict between the decision of the Tenth Circuit in this case and the decisions of the other Circuit Courts of Appeal.

ARGUMENT.

I.

A proper case for declaratory relief was stated in the bill of complaint.

The learned Circuit Court of Appeals for the Tenth Circuit held that the District Court had exceeded its discretionary power in dismissing respondent's bill of complaint. It therefore reversed the District Court's judgment and remanded the cause.

The propriety of the Circuit Court of Appeals' decision is manifest from the decisions of this court and the various Circuit Courts of Appeal. The facts in this case clearly establish that when respondent filed its suit for declaratory relief there was no action of petitioner's pending to which respondent was a party. The garnishment proceeding at that time was against Central, and it was based on a default judgment obtained against Cooper-Jarrett after both Cooper-Jarrett and Central had been discharged from all liability to petitioner. Central's liability, if any, arose from its contract with Cooper-Jarrett. Respondent's liability, if liability there was, arose from its separate contract with Central. Respondent's rights and liabilities as a reinsurer of Central's risks could not have been determined in the only garnishment proceeding pending when its bill for declaratory relief was filed, because that proceeding was against Central alone. Respondent was neither a proper nor a necessary party to that case and could not be made a party.

Prior to respondent's instituting this action for a declaratory judgment it had been threatened with suit, and an actual justiciable controversy existed between it and

petitioner. Under such circumstances, respondent chose to avail itself of the remedy given to it by the Federal Declaratory Judgment Act rather than to await the whim or caprice of petitioner to have its possible liability adjudicated.

It has been held consistently that under similar circumstances a party is entitled to declaratory relief, and that the trial court has no discretion to deny the remedy granted by the Declaratory Judgment Act. *Ohio Casualty Company* v. *Gordon*, 95 F. (2d) 605 (C. C. A. 10, 1938); *Employers Liability Assur. Corp., Ltd.*, v. *Ryan*, 109 F. (2d) 690 (C. C. A. 6, 1940), *cert. granted*, 310 U. S. 621, 84 L. Ed. 1394, *dismissed*, 311 U. S. 722, 85 L. Ed. 45; *Western Cas. & Surety Co.* v. *Beverforden*, 93 F. (2d) 166 (C. C. A. 8, 1937); *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 F. (2d) 514 (C. C. A. 3, 1938); *United States Fid. & G. Co.* v. *Koch*, 102 F. (2d) 288 (C. C. A. 3, 1939); *Aetna Life Ins. Co.* v. *Martin*, 108 F. (2d) 824 (C. C. A. 8, 1940); and *Lehigh Coal & Navigation Co.* v. *Central Railway of N. J.*, 33 F. Supp. 362 (D. Ct. Pa. 1940).

The existence of another adequate remedy is no reason for a court to refuse to grant relief by way of a declaration of rights. Rule 57, Rules of Civil Procedure (28 U. S. C. A. following Section 723c). In the *Lehigh Coal* case, *supra*, Kalodner, J., said (page 366):

> "As was stated in *Employers' Liability Assur. Corp., Limited*, v. *Ryan et al., supra*, Rule 57 has crystallized the prevailing view that the Declaratory Judgment Act furnishes an additional remedy which is not to be denied the plaintiff because of the pendency of another suit."

Where the state court action will not determine all the issues included in the declaratory judgment suit, it has

been held that the pendency of such an action in a state court will not justify a denial of declaratory relief. In *Maryland Casualty Co.* v. *United Corp.*, 111 F. (2d) 443 (C. C. A. 1, 1940), the Circuit Court of Appeals reversed the District Court's dismissal of a bill for a declaratory judgment where there was a pending state action because:

> "* * * in the case at bar the pending suit in the state court will determine only the liability of the Assured for negligence; it will not determine whether the insurer had any obligation to defend or whether the insurer is obligated to indemnify the Assured. Under such circumstances it has been held, we think rightly, that the application of an insurer for a declaratory judgment cannot be denied as a matter of discretion. *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.*, 3 Cir., 101 F. 2d 514, 515, 516."

Moreover, it has been held that declaratory relief may not be denied upon the grounds that some other action in the future may dispose of the issues involved in the declaratory judgment suit. *Aetna Life Ins. Co.* v. *Martin*, 108 F. (2d) 824, 828 (C. C. A. 8, 1940). See also *Columbian Nat. Life Ins. Co.* v. *Foulke*, 89 F. (2d) 261 (C. C. A. 8, 1937); *Western Casualty & Surety Co.* v. *Beverforden*, 93 F. (2d) 166 (C. C. A. 8, 1937); *New York Life Ins. Co.* v. *Roe*, 102 F. (2d) 28 (C. C. A. 8, 1939); and *Carpenter* v. *Edmonson*, 92 F. (2d) 895 (C. C. A. 5, 1937).

This court, in *Maryland Casualty Co.* v. *Pacific Oil & Coal Co.*, 312 U. S. 270, 85 L. Ed. 455 (1940), has decided by necessary implication at least, that the pendency of a state court action and the possibility that the judgment therein will be followed by supplemental process in the nature of garnishment against one requesting a declaratory judgment does not warrant the dismissal of the declaratory judgment action.

These authorities establish beyond peradventure of doubt that respondent in this case is entitled to relief by way of declaratory judgment. The mere fact that petitioner, at the time respondent filed its bill, may have intended at some indefinite time in the future, to have instituted garnishment proceedings against respondent cannot defeat respondent's right to a declaration. To so hold would absolutely nullify the express intention of Congress to give a potential litigant the right to have his liability determined without having to await coercive action by his adversary.

II.

Respondent's declaratory judgment suit is not tantamount to the removal of a non-removable action.

Petitioner has gone to great length in his brief to develop the theory that under Missouri law garnishment is a supplemental process in aid of execution. From this premise, petitioner reaches the amazing conclusion that since there was an unsatisfied judgment against Cooper-Jarrett and a garnishment proceeding upon that judgment against Central, a suit involving the same issues as those in respondent's declaratory judgment action was pending against respondent at the time it filed suit in the District Court. Petitioner reaches this anomalous result despite his admission that at the time the declaratory judgment action was commenced no proceeding or process had been instituted or issued against respondent (R. 14, 21).

Petitioner's argument is both specious and misleading. Whether the Missouri garnishment statute gives petitioner a supplemental remedy which is a continuation of the original suit against Cooper-Jarrett or whether it is a

separate and independent action is a bootless distinction. It is an attempt to deny respondent the right to declaratory relief through the creation of a fictional difference.

It is recognized that declaratory relief is equitable in nature and derived in part from *quia timet* relief. An ancient maxim of equity jurisprudence holds that *equity regards the substance and intent rather than the form.* Bearing in mind this maxim, an analysis of petitioner's argument shows its fallacy. Garnishment, whether considered to be a supplemental or an independent action, is based on the same fundamental principle—that a judgment creditor may reach credits of his judgment debtor. Regardless of which label the procedure bears, the issue in each type is the same, namely, does the defendant in garnishment owe the judgment debtor anything? Under the Missouri practice, the garnishment proceeding is instituted by a summons issued to the garnishee. Not until that is done is the garnishee subject to the jurisdiction of the court. By no stretch of the imagination can it be said that a suit was pending against respondent prior to the time it was served with summons of garnishment. The record shows (R. 20) that this was not done until after the institution of this declaratory judgment action. Judgment against Central, which is the *sine qua non* of garnishment of respondent, was not obtained until June 28, 1940 (R. 38).

Homan v. *Employers Reinsurance Corp.*, 345 Mo. 65, 136 S. W. (2d) 289 (1939), is not authority for the proposition advanced on page 28 of petitioner's brief that garnishment of respondent is not dependent upon a judgment against Central. In the *Homan case* the Missouri court considered a contract entirely different from respondent's contract with Central. The contract before the Supreme Court of Ohio in *Sticket* v. *Excess Ins. Co.*

f America, 136 Ohio St. 49, 23 N. E. (2d) 839 (1939), is he same contract between Excess and Central that is involved in this case. And on motion for rehearing the lissouri court was careful to distinguish this Excess-entral contract from the contract before it in the *Homan ase*. It said (page 302) that

> "* * * We think the contract under consideration there (Stickel case) is easily distinguishable from the one here. The court followed the case of *Fidelity and Deposit Company* v. *Pink*, 302 U. S. 224, 58 Sup. Ct. 162, 82 L. Ed. 213, as the most applicable case and thereafter said, 'It would be superfluous to cite additional authorities, for, after all, the decisions turn largely upon the language of the particular contract under examination in the particular occasion.'"

The authorities discussed in Point I of this brief, and particularly the *Pacific Oil & Gas*, *Gordon*, and *Ryan* cases, clearly establish that petitioner's assertion that the opinion below permits the removal of a non-removable cause is without merit.

III.

There is no conflict between the decisions of the various circuits.

Petitioner contends that the opinion of the Circuit Court of Appeals in this case conflicts with the opinions in *Aetna Gas. & Ins. Co.* v. *Quarles*, 92 F. (2d) 321 (C. C. A. 4, 1937); *American Automobile Ins. Co.* v. *Freundt*, 103 F. (2d) 613 (C. C. A. 7, 1939); *Thompson* v. *Moore*, 102 F. (2d) 372 (C. C. A. 8, 1940); and *State Farm Mutual Ins. Co.* v. *Hugee*, 115 F. (2d) 298 (C. C. A. 4, 1940).

The *Quarles case* was one of the earlier decisions dealing with the Federal Declaratory Judgment Act. While some cases have followed it, nevertheless the rule it announced is recognized to have been superseded by Rule 57, Rules of Civil Procedure and subsequent courts of appeals decisions. In *Employers Liability Assur. Corp., Ltd.* v. *Ryan*, 102 F. (2d) 690 (C. C. A. 6, 1940), *cert. granted*, 310 U. S. 261, 84 L. Ed. 1394, *dismissed*, 311 U. S. 722, 85 L. Ed. 45, the court was urged to follow the decision in the *Quarles case*. In refusing to do so, it said:

> "'The Quarles case was one of the early decisions interpretative of the Declaratory Judgment Act. It was thought by the court therein that the remedy should not be invoked merely to try issues or determine the validity of defenses in pending cases. The presently prevailing view seems to be that the Declaratory Judgment Act furnishes an additional remedy which is not to be denied the plaintiff because of the pendency of another suit, a concept which, as noted by us in *E. W. Bliss Co.* v. *Cold Metal Process Co.*, 6 Cir., 102 F. (2d) 105, has been crystalized by the Rules of Civil Procedure for the District Courts of the United States, in Rule 57, 28 U. S. C. A. following Section 723c, which provides 'The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.'"

In addition, the *Quarles case* can be distinguished upon the facts. There the original bill was amended to show that judgment had been obtained and supplemental proceedings instituted upon that judgment in the state court. The declaratory judgment was sought on the bill as amended. Here, on the other hand, no garnishment was issued against respondent and it was never a party to petitioner's state court action until almost two months

ter the bill was filed in the district court. Respondent's etition was never amended and petitioner's motion to smiss was filed before he had obtained judgment against entral (R. 5, 30).

The *Freundt case* is not applicable because there the urt held that under Illinois law the garnishment proeding afforded the opportunity to determine the exact sue raised in the Declaratory Judgment Act. This is t true in the instant case. The only question properly fore the Missouri Court in the garnishment proceedg is whether or not respondent owes Central, the judgent debtor. Under the Missouri law and decisions spondent can not maintain what amounts to a collateral ttack upon petitioner's judgments against Cooper-Jarrett nd Central upon which the garnishment is founded. Only the record shows on its face that those judgments are oid can respondent successfully attack them. *Potter* v. *Whitten*, 161 Mo. App. 118, 142 S. W. 453 (1912); *Nevatt* v. *Springfield Normal School*, 79 Mo. App. 198 (1899); *Wise* v. *Loring*, 54 Mo. App. 258 (1893); and *Godman* v. *Gordon*, 61 Mo. App. 685 (1895). Consequently, to deny espondent the right to a declaratory judgment will also eny respondent the right to question the regularity and alidity of the judgments against Cooper-Jarrett and entral.

The *Moore case* is not pertinent for there the Federal urt did not have jurisdiction because of the absence of he required diversity of citizenship. And the same criticism and distinction applies to *State Farm Mutual Automobile Co.* v. *Hugee*, which is relied upon by petitioner.

Conclusion.

The authorities clearly establish that respondent is entitled to relief by way of a declaratory judgment, and that the Circuit Court of Appeals for the Tenth Circuit properly reversed the District Court's order of dismissal.

It is urged, therefore, that the petition for certiorari be denied.

Respectfully submitted,

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